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IN THE

Supreme Court of the United States

October Term, 1965

No. 1044

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,
Petitioners,

AGAINST

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,

Petitioners,

AGAINST

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners herein hereby apply to this court for a writ of certiorari to the Court of Appeals for the Second Circuit seeking review of a determination by that court which affirmed an order and judgment of the United States District Court for the Southern District of New York striking out the answer of the defendants in Action No. 1 and entering a default judgment in said action, dismissing Actions Nos. 2 and 3 and refusing permission to said petitioners to cure said default.

Jurisdiction

The court has jurisdiction to grant the relief sought herein pursuant to 28 USC §1254(1). The decision of

the Court of Appeals to which objection is taken was made on December 7, 1965. This petition is filed within three (3) months of said determination as required.

Citation of Opinions Below

See Appendix.

Facts Involved

Petitioner Joseph Levy, for many years, utilized the trademark "SLUMBA-TOGS" in his business. Levy was a controlling stockholder of Slumba-Togs Manufacturing Corporation (a Pennsylvania corporation) long prior to any date of first use of the respondent Slumbertogs, Inc.'s alleged trademark. Long after use by petitioner Joseph Levy of his "SLUMBA-TOGS" trademark on a large scale the respondent Slumbertogs, Inc. commenced utilizing a trademark known as "SLUMBERTOGS". In 1957 Levy's corporation litigated the matter in connection with an infringement suit brought by respondent Slumbertogs, Inc. and, after trial on the merits, the court dismissed the complaint. Subsequently Levy assigned his rights to his "SLUMBA-TOGS" trademark to the petitioner Jiggs, Inc. and respondent Slumbertogs, Inc. brought a second suit for alleged trademark infringement against Jiggs, Inc. Because of claimed defective title Judge Murphy of the United States District Court for the Southern District of New York granted a preliminary injunction against the petitioner Jiggs. After filing appropriate corrective assignments Judge Bryan of the same court vacated this preliminary injunction and the determination was affirmed by the Court of Appeals for the Second Circuit. A bill of costs was entered against

the respondents Slumbertogs, Inc. and, despite such entry, respondent Slumbertogs, Inc. willfully and deliberately failed to pay this bill of costs.

While these proceedings were pending petitioner Joseph Levy commenced his own action against the respondents and petitioner Jiggs, Inc. commenced its own action against the controlling stockholders of Slumbertogs, Inc. These three (3) actions then continued together in unconsolidated form.

Subsequently, after extensive depositions were taken by the respondents Action No. 1 was placed on the trial calendar of the United States District Court for the Southern District of New York. General Rule 9(1) of the General Rules for the United States District Courts for the Southern and Eastern Districts of New York reads as follows:

> "No motion except for judgment or other final relief will be entertained in a case after it has reached the Permanent Calendar pursuant to the Calendar Rules unless the moving party has first obtained an order from the Part I Judge granting permission to make such motion. Application to the Part I Judge for such an order must be made on five (5) days' notice to all parties who have appeared in the action upon a showing by affidavit that circumstances arising subsequent to the date when the case reached the Permanent Calendar require that the motion sought to be made is necessary in the interests of substantial justice. This subdivision does not apply to motions or applications which are required to be made to the Part I Judge under the Calendar Rules."

Calendar Rule 5(a)(8) of the United States District Court for the Southern District of New York reads as follows:

> "(a) A party desiring to place a cause upon the trial calendar may file with the clerk, with proof of service thereof upon the attorneys of all parties who have appeared, a note of issue signed by an attorney of record stating:
>
> (8) That the parties have taken, or have had reasonable opportunity to take and complete necessary depositions and other discovery proceedings;"

Despite such representation the respondent Slumbertogs, Inc. served a set of interrogatories upon the petitioners Jiggs, Inc., Philip Levine, and Phyllis Levine. Petitioner Jiggs did not desire to become overly technical and hence made preparations to answer these interrogatories. However the person having knowledge of the facts was not the petitioners Jiggs, et al., but was actually Joseph Levy. Hence these interrogatories could not be answered until a consolidation of the actions was made. Accordingly an order was obtained on February 3, 1965 enlarging the time to answer such interrogatories until the actions involved were consolidated. The application was granted by Judge Cashin of the United States District Court for the Southern District of New York. Nevertheless, despite Judge Cashin's order, respondent Slumbertogs, Inc. moved in the United States District Court for the Southern District of New York to strike the defendants' answer in Action No. 1 upon the alleged ground that said defendants had failed to answer interrogatories. Defendants cross-moved for an order consolidating the three (3) pending actions. Chief Judge Ryan of the United States District Court for the South-

ern District of New York granted the application to consolidate but further required that application be made by April 19, 1965 to set the case down for trial before a judge to be designated. Judge Ryan further stated that if such application was not made prior to this date an *ex parte* order would be entered dismissing all suits. Judge Ryan further ruled that defendants would be given an additional ten (10) days to answer the pending interrogatories.

Apparently, in the New York Law Journal, a publication bearing the ambiguous notation "see memorandum" was published but this was apparently overlooked by all three (3) counsel representing petitioners. The clerk's docket of the United States District Court for the Southern District of New York indicates that notice of the entry of an order was mailed to three (3) separate attorneys for the petitioners (all of such attorneys having different offices in different parts of the City of New York). All of said attorneys have submitted affidavits that no notice of the entry of such order was ever received by them. The alleged "Notice" contained no details of the contents of the order, nor any time limit contained therein.

After expiration of the ten (10) day period set forth in the court's determination of April 7, 1965 the respondent Slumbertogs, Inc., ex parte, and *concededly without any notice to any of the attorneys representing the adverse parties* submitted a judgment granting a permanent injunction against the petitioners restraining said petitioners from utilizing their valuable trademark "SLUMBA-TOGS", dismissing Actions Nos. 2 and 3 on the merits and with costs.

Application was then made before Judge Ryan to vacate the petitioners' default upon the ground that they

had never received notice of the order. Appropriate affidavits were submitted by three (3) well known members of the Bar of the State of New York certifying to the fact that they had never received notice of Judge Ryan's order and requesting an additional period of ten (10) days to serve their answers to the interrogatories since the Actions had now been consolidated and the interrogatories could now be answered by the proper party, Joseph Levy. The petitioners' counsel informed Judge Ryan, on this application, that the interrogatories could be answered within a matter of days and even could be answered within twenty-four (24) hours. Prior to receipt of notice of Judge Ryan's second determination the interrogatories were, in fact, answered and answers filed. Nevertheless Judge Ryan denied the petitioner's application to vacate his prior order.

An appeal was then taken to the Court of Appeals for the Second Circuit. Consistently attempting to rely on technical objections and defenses and in order to avoid a determination on the merits the respondents made an application to dismiss the appeal upon the alleged ground that the Appendix was not in accordance with the rules. Petitioners cross-moved for an order holding the Appendix adequate. The Court of Appeals (a different panel of judges than the panel making the determination for which review is sought herein) granted petitioners' motion and rendered the following opinion:

> "• • • Motion granted and appendix declared to be adequate compliance with this Court's order of July 8, 1965. The Order of July 14, 1965, entered pursuant to Judge Friendly's direction permits appellees' brief to be served on or before September 27, 1965. The clerk is requested to place these consolidated appeals on the calendar

immediately thereafter if possible. Whatever may be the ultimate merits of the parties' contentions, they should be aired before a trial court and not be endlessly avoided by a long series of procedural motions."

Thereafter the appeal itself came on for hearing before the Court of Appeals before a different panel of judges than the judges who made the determination above quoted. This panel failed to follow the determination of the prior panel but affirmed Judge Ryan in all respects. It is from this order of affirmance that the instant petition for a writ of certiorari is being taken.

POINT I

Certiorari should be granted herein because the determination made by this Court constitutes a direct violation of the Fifth Amendment to the Constitution of the United States in that said determination has deprived petitioners of property (a valuable trademark) without due process of law.

The sole justification for the drastic penalties imposed upon the petitioners must be found in Rule 37(a) F. R. C. P., the pertinent portion of which reads as follows:

"• • • Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. • • •"

Rule 37(b) F. R. C. P., provides in part as follows:

> "* * * (2) OTHER CONSEQUENCES. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:
>
> * * * (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; * * *"

Until the motion to consolidate was granted, in view of Judge Cashin's order (which Judge Ryan could not find when he made the determination complained of) there could be no refusal to answer. Subsequently Judge Ryan had the power to direct the petitioners to answer but, in such event, the sanctions provided for under Rule 37 could not be imposed until the petitioners willfully refused to comply with Judge Ryan's order. Since the petitioners had no notice of such order the granting of sanctions against petitioners was not warranted.

Furthermore the interrogatories which were not answered were served only in connection with Action No. 1 and any sanctions could only be imposed upon the peti-

tioners in Action No. 1. There was no refusal to answer *any* interrogatories in connection with Actions Nos. 2 and 3.

This court in *Societé Internationale* v. *Brownell,* 357 U. S. 197, makes it quite clear that this court will consider the employment of any remedy which is not justified by the circumstances of the case as a violation of the party's constitutional rights and failure to give such party "due process of law". Furthermore this court has further held in *Galvan* v. *Press,* 347 U. S. 522, fair play is the essence of "due process". This court also held in *McNabb* v. *U. S.,* 318 U. S. 322; *Ackerman* v. *U. S.,* 179 Fed. (2nd) 236, affirmed 340 U. S. 193, that "due process" requires that a litigant have the right to present his claim including any defenses that he may have. If the determination of the Court of Appeals for the Second Circuit is allowed to stand unreviewed in this case it is respectfully submitted that a direct violation of the Fifth Amendment of the United States has been committed.

Here the petitioners, merely because they did not file answers to certain interrogatories *by a certain date,* and where a prior order of this court granted them time to file such answers until subsequent to the granting of a motion to consolidate, and where answers to such interrogatories were, in fact, filed as soon as the petitioners obtained notice of such determination, were nevertheless deprived of their valuable trademark rights, subjected to a substantial bill of costs, and enjoined from utilizing a trademark that they had utilized for many years. Furthermore the court dismissed substantial antitrust claims which petitioners had against respondents which would have resulted in judgments against respondents for large sums of money. A more direct violation of

the provisions of the Fifth Amendment to the Constitution of the United States would be hard to find. The constitutional point was raised by petitioners before the Court of Appeals but ignored in that Court's opinion.

There are other substantial violations of due process involved in this action. These violations will be set forth subsequently in succeeding points. In particular petitioners complain of the failure of the Court of Appeals to follow the provisions of the Federal Rules of Civil Procedure, the failure of the Court of Appeals to follow prior determinations of its own court, and failure of the Court of Appeals to follow a prior determination of a different panel of the same court in this very action.

POINT II

Certiorari should be granted in the instant case because of a conflict between the instant determination of the Court of Appeals for the Second Circuit and the Courts of Appeals of the Tenth Circuit and the Eighth Circuit.

The judgment entered against the petitioners was based upon a provision in the order of Judge Ryan holding that, if the petitioners failed to answer certain interrogatories within ten (10) days from the date of entry of the order that a judgment by default would be entered *ex parte* and *without notice.* Concededly no *copy of Judge Ryan's order with notice of entry* was ever served upon *any* attorney for the petitioners nor was any copy of the application for judgment by default ever served upon *any* attorney for the petitioners. This constitutes a direct violation of Rule 55(b)(2) F. R. C. P. which reads as follows:

> "• • • If the party against whom judgment by default is sought has appeared in the action he • • • shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. • • •"

The Court of Appeals, in affirming the determination of Judge Ryan, completely ignored the provisions of this rule, even though this rule was brought to the court's attention and the point specifically *raised* on this appeal. The Courts of Appeals of both the Tenth and the Eighth Circuits have specifically held to the contrary. For example in *Meeker* v. *Rizley,* 10 Cir. 324 Fed. (2nd) 269 (271), the Court of Appeals of the Tenth Circuit, in setting aside a default judgment entered without the proper notice, had this to say:

> "• • • We need not determine in this instance whether the default judgment entered was void or voidable, since the failure to give the required three day notice constitutes cause for setting it aside. • • •"

To the same effect is *Commercial Casualty Insurance Co.* v. *White Line, etc.,* 8 Cir. 114 Fed. (2nd) 946; *Dalminter, Inc.* v. *Jessie Edwards, Inc.,* 27 F.R.D. 491.

Where conflict between circuits is involved this court hash generally granted certiorari to resolve the conflict. See, for example, *Bruning* v. *U. S.,* 376 U. S. 358; *U. S.* v. *Carlo Bianchi & Co.,* 373 U. S. 709; *DiBella* v. *U. S.,* 369 U. S. 121; *NLRB* v. *New Syndicate Co.,* 365 U. S. 695; *Flora* v. *U. S.,* 357 U. S. 63; *Rogers* v. *Quan,* 357 U. S. 193; *NLRB* v. *Duval Jewelry Co.,* 357 U. S. 1; *Rainwater* v. *U. S.,* 356 U. S. 590; *U. S.* v. *F. & M. Schaefer Brewing Co.,* 356 U. S. 227; and *Haynes* v. *U. S.,* 353 U. S. 81.

POINT III

Certiorari should be granted herein because of the failure of the Court of Appeals for the Second Circuit to follow its own prior decisions and to follow a decision in the instant case made by another panel of the same court.

The procedural history of this case indicates actual "procedural anarchy". Based upon the facts involved herein, and particularly noting that the petitioners' alleged "default" was neither willful or deliberate, the Court of Appeals for the Second Circuit has repeatedly held that, under such circumstances, a determination similar to that made by Judge Ryan will not be sustained. This court's attention is specifically called to the case of *Gill* v. *Stolow*, 2 Cir. 240 Fed. (2nd) 669 (672), where the Court of Appeals for the Second Circuit in vacating a "default judgment" based upon a party's alleged failure to allow discovery by his adversary had this to say:

> "• • • In final analysis, a court has the responsibility to do justice between man and man, and general principles cannot justify denial of a party's fair day in Court except upon a serious showing of willful default. • • • "

The above principle of law has been consistently followed by courts in other jurisdictions. For example in *Alopari* v. *O'Leary*, 154 Fed. Supp. 78 (80), the court said:

> "• • • A motion to set aside a default is addressed to the discretion of the court. Any doubt should be resolved in setting aside defaults so that every case may be decided upon the merits. • • • "

To the same effect is *Huntington Cab Co.* v. *American Fidelity and Casualty Company,* 4 F. R. D. 496; *Tozer* v. *Charles A. Krause Milling Co.,* 3 Cir. 189 Fed. (2nd) 242; and *Nunn* v. *Reina,* 21 F. R. D. 573.

As a matter of fact, in the case at bar, the Court of Appeals for the Second Circuit failed to follow a prior determination *of the same court in the same case.* As pointed out, *supra,* the court previously determined that this action should proceed promptly to trial but then made the determination complained of.

Under these circumstances it is respectfully submitted that not only has "due process" been violated but the Court of Appeals itself has been guilty of procedural anarchy and of a failure to follow its own prior determinations.

POINT IV

The failure to give notice to the petitioners that a judgment by default would be taken against them makes a judgment so entered absolutely void.

It will be observed that the order which brought about a default judgment in this case did not call for service of same on the petitioners. As a matter of fact no statement which directed that answers to interrogatories be served by a certain date was ever communicated to the petitioners. While the statement is made that notice of such order was given to the petitioners (which is denied by the petitioners who submitted affidavits to prove that they never received such notice) such notice nevertheless would be only in a form to advise the petitioners that "an order has been entered". This of course would not be any notice that answers to interrogatories should be

served by a certain date and publication in the Law Journal referred to in the decision of the District Judge would also be to the effect that a court memorandum was filed in this case. To put the party in default more is needed than merely a postcard advising them that an order has been entered. The default would never have occurred if the parties had been specifically told when answers to interrogatories should be served.

The case of *Meeker* v. *Rizley*, 10 Cir. 324 Fed. (2nd) 269 (271), is directly in point. In that case, where a default judgment was entered without the proper notice, the court had this to say:

> "* * * We need not determine in this instance whether the default judgment entered was void or voidable, since the failure to give the required three day notice constitutes cause for setting it aside. * * *"

To the same effect is *Commercial Casualty Insurance Co.* v. *White Line, etc.*, 8 Cir. 114 Fed. (2nd) 946; *Dalminter, Inc.* v. *Jessie Edwards, Inc.*, 27 F.R.D. 491.

POINT V

Even assuming that the default judgment was validly entered the District Judge erred in failing to set it aside.

The petitioners, when they finally received notice of the default judgment, promptly moved before the District Judge to set it aside. The petitioners claimed that they had never received notice from the clerk of this court of the entry of the original order. This was certified to by the three (3) attorneys who were entitled to notice of the

District Judge's order, and, in fact, on the hearing before the District Judge, the petitioners' counsel demanded to know if the petitioners' counsel had received notice of the entry of the order. The District Judge did not permit an answer to this question.

Under these circumstances the court erred in failure to relieve the petitioners of their default. Even if the court had the power to enter such default judgment, its failure to do so was an abuse of discretion.

A case almost directly in point is *Alopari* v. *O'Leary*, 154 Fed. Supp. 78(80), where the Court said:

> " * * * A motion to set aside a default is addressed to the discretion of the court. Any doubt should be resolved in setting aside defaults so that every case may be decided upon the merits. * * * "

To the same effect is *Huntington Cab Co.* v. *American Fidelity & Casualty Co.*, 4 F.R.D. 496; *Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir. 189 Fed. (2nd) 242; and *Nunn* v. *Reina*, 21 F. R. D. 573.

The rationale used by the District Judge in refusing to open the default was that notice of the entry of the order was published in the New York Law Journal. It is submitted that, since the clerk is required to give notice of entry of orders, the petitioners are not charged with constructive notice by reason of such publication. The New York Law Journal is not an official publication such as the Federal Register.

However, even assuming, *arguendo*, that the petitioners' attorneys were negligent in failing to note the decision in the New York Law Journal, this is not sufficient cause to deny an application to open a default. The court's attention is respectfully called to *Barber* v. *Turberville*, 218 Fed. (2nd) 34(36), where the court said:

> "* * * That the defendant personally was not negligent in the protection of her interests appears clear from the facts recited. In situations such as the one here disclosed, the courts have been reluctant to attribute to the parties the errors of their legal representatives. * * *"

To the same effect is *Kantor Bros.* v. *Mutual Construction Co.*, 3 F.R.D. 227 and *Elias* v. *Pitucci*, 13 F.R.D. 13.

POINT VI

The facts herein did not justify the District Judge in granting the drastic penalty against the appellants under the facts set forth herein.

To understand the situation in this case it is necessary to point out the fact that this action has been pending for a long time. That at least two (2) appeals had been taken to the Circuit Court in connection with applications for preliminary injunctions, that the Circuit Court had both granted and denied injunctions *pendente lite* that the respondents have been harassing the petitioners with a variety of examinations, depositions, motions and what not all tending to prevent a prompt trial of this action. Whenever vexations and unnecessary depositions were called for and the petitioners would seek to limit or dispose of these unnecessary preliminaries, the respondents would always make charges of lack of cooperation and do everything in their power to prevent disposition of the suit.

The suit involved primarily the use of a trademark which the respondents claimed had acquired a special meaning, a contention disputed and put in issue by the petitioners.

In fact it became necessary to bring separate suits in connection with the petitioners' position in this matter and even then the respondent did everything in its power to precent a consolidation of the suits. It was impossible to answer some of the interrogatories unless all of the parties were before the court and unless there had been a consolidation of the actions. After long and drawn out proceedings the petitioners finally succeeded in having the actions consolidated—there had been no opportunity or possibility to answer the interrogatories in question until such consolidation had become effective. It was only then that the petitioners were confronted with the order of the court fixing a date for the completion of the interrogatories and such date had already elapsed when the petitioners obtained knowledge of same. Thereupon the petitioners promptly moved to be relieved of their default and it was then that the district court refused to give the petitioners the opportunity to answer the interrogatories, and when such interrogatories were finally served the respondents returned the same claiming that they were not served in time.

It is quite clear that the respondents sought to avoid coming to grips with the issues before the trial court and indulged in procedural motions for the sole purpose of *not* permitting the petitioners to cure any default which might have been charged against them.

The situation in the case at bar is quite analogous to that in *Gill* v. *Stolow,* 2 Cir. 240 Fed. (2nd) 669 (672), where this court said:

> "* * * In final analysis, a court has the responsibility to justice between man and man, and general principles cannot justify denial of a party's fari day in court except upon a serious showing of willful default. * * *"

Petitioners did not have the duty to answer the interrogatories until after the consolidation motion was granted. After this, and as soon as notice of Judge Ryan's order was received, the interrogatories were promptly answered. Rule 37 sanctions were not justified and certainly dismissal was not justified on this record.

POINT VII

All documents and papers were produced by petitioners in this case whenever an order was made for their production even in cases where the petitioners felt that the orders were too drastic and sought from time to time to limit the same.

Not a single document or paper required or a single question propounded to the petitioners remained unanswered whenever an order of the court required the production of such documents or the answer to a particular interrogatory. The petitioners had a right to oppose unjustified demands and whenever such opposition was resolved against the petitioners, the petitioners complied with an order of the court.

Reference is made in the opinion of the Circuit Court of Appeals to alleged "dilatory and contumacious conduct of plaintiffs and their counsel" in this matter. In the brief submitted by the respondent references are made to various intermediate motions which they claim were decided in a manner to show contempt for court orders, etc. An examination of the record will show that the statement has no bearing of the precise points raised in this case and does not provide any excuse for the court's failure to honor the Rules of Civil Procedure. To employ a drastic remedy like a judgment by default

where a suit has been pending for many years, where motions and cross-motions were made in the District Court and in the Circuit Court, where no attempt has been made to try the case on the merits, is clearly not a willful and deliberate default permitting the drastic remedy of a judgment in favor of the plaintiff and dismissing two other actions in which no attempt was ever made for any preliminary proceedings or the taking of depositions or noticing same for trial.

CONCLUSION

Certiorari should be granted in this case and the judgment vacated.

Dated: February 18, 1966

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion of the Court of Appeals for the Second Circuit

Before:

WATERMAN, MOORE, *Circuit Judges*, and
TYLER, *District Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge*, striking out the answer of the defendant in Action No. 1, directing the entry of a default judgment in said action, dismissing Actions No. 2 and 3 and refusing the defendant in Action No. 1 permission to cure its alleged default.

Affirmed.

MAXIMILIAN BADER, New York, N. Y. (Bader & Bader, New York, N. Y., on the brief; Samuel Gutterman, New York, N. Y., of counsel), *for appellants*.

MILTON MOUND, New York, N. Y. (Mound, Isaacs & Greenburg, New York, N. Y., on the brief; Henry A. Greenburg, New York, N. Y., of counsel), *for appellees*.

PER CURIAM:

Beyond a peradventure, Chief Judge Ryan acted well within the limits of sound discretion in issuing his order filed May 4, 1965 wherein he refused to vacate the judgments of dismissal entered against plaintiffs-appellants in these consolidated actions on April 26, 1965. In view of the dilatory and contumacious conduct of plaintiffs and

their counsel in virtual definance of the rules and orders of at least six judges in the district court, the sanction of dismissal was reasonable and correct. *Nasser* v. *Isthmian Lines,* 331 F. 2d 124 (2 Cir. 1964); *Parker* v. *Broadcast Music, Inc.,* 289 F. 2d 313 (2 Cir. 1961). Moreover, there is no merit whatsoever in appellants' claim, ostensibly made under Rule 60(b)(1), Fed. R. Civ. P., that they did not receive proper notice of the trial court's order of April 6, 1965 requiring them to answer certain interrogatories within five (5) days; as Chief Judge Ryan observed in his May 4 order, the record establishes that notice of the April 6 order was timely mailed to counsel by the clerk's office and was also provided by publication in the New York Law Journal on April 8, 1965.

The order appealed from is affirmed with costs to appellees.

Original Opinion of the United States District Court for the Southern District of New York

Endorsement, April 7, 1965

SLUMBERTOGS, INC. v. JIGGS, INC., et al. 62 Civ. 2816

JOSEP LEVY, et al. v. SLUMBERTOGS, INC., et al. 63 Civ. 2933

JIGGS, INC., et al. v. HERBERT B. LEVENSON et al. 63 Civ. 2267

Endorsement

There are three separate suits before us. In *Slumbertogs, Inc.* v. *Jiggs, Inc., et al.* (62 Civ. 2816) filed in August, 1962, plaintiff, alleged owner of the trademark "Slumbertogs", seeks to enjoin defendant and its officers from using the trademark "Slumba-Togs". Defendants counterclaim alleging fraud in the federal registration of the mark "Slumbertogs" and violations of the Sherman and Robinson-Patman Acts. In *Joseph Levy, et al.* v. *Slumbertogs, Inc., et al.* (63 Civ. 2933) filed on October 8, 1963, and in *Jiggs, Inc. et al. Herbert B. Levenson, et al.* (63 Civ. 2267) filed on July 30, 1963, suits are brought by substantially the same defendants in the first suit against the plaintiff in that action, and allege the same claims pleaded in the counterclaims of the first suit.

Defendants in 62 Civil 2816 (plaintiffs in 63 Civil 2933 and 63 Civil 2267) move for consolidation of the three suits. (Rule 42(a), F.R.C.P.)

Plaintiff, in 62 Civil 2816, moves to strike defendants' answer and counterclaim and for judgment for plaintiff on the ground that defendants have refused to comply with orders for discovery. (Rule 37, F.R.C.P.) Plaintiff,

in 62 Civil 2816, also moves for the designation of a Rule 2(b) Judge (General Rules of this Court).

Motion for consolidation granted. Rule 42(a) F.R.C.P. permits consolidation of actions "involving a common question of law or fact". Defendants' counterclaims in 62 Civil 2816 alleging fraud in the registration of "Slumbertogs" trademark and violations of the Sherman and Robinson-Patman Acts, are identical to the complaints in 63 Civil 2933 and 63 Civil 2267. There are common questions of law and fact in all three suits.

Plaintiff's motion in 62 Civil 2816, pursuant to Rule 37, F.R.C.P., is denied, provided that defendants comply with the orders in question within five days from the date hereof. If defendants fail to comply within this period, plaintiff may submit an ex parte order and affidavit of default, granting judgment for plaintiff.

Plaintiff alleges that defendants have failed to answer certain interrogatories despite two orders of this Court. Plaintiff served these interrogatories on the defendants in November, 1964. Plaintiff states that on February 2, 1965, at pretrial part of this Court, Judge Cashin ordered defendants to answer these interrogatories not later than February 18, 1965. When defendants failed to serve their answers by February 23, 1965, Judge Cashin extended their time to answer until March 9, 1965. Defendants have still not answered the interrogatories. Defendants contend that Judge Cashin gave them until March 23, 1965 to answer. Plaintiff has not given us a copy of Judge Cashin's orders, and we have been unable to locate them in the docket book where plaintiff alleges that they were endorsed. In view of these facts, defendants are given an additional ten days from the date hereof in which to an-

swer. We will not, however, accept any delay beyond this period.

Plaintiff's motion in the suits as consolidated for a Rule 2(b) Judge is granted. Due to the crowded dockets, I am unable to appoint a Judge at this time, but until further order, all further motions in these suits shall be made returnable before me. A Rule 2(b) Judge will be designated as soon as possible.

62 Civil 2816 has been pending for more than two and a half years. There have been delays on both sides. Slumbertogs, Inc., was granted a preliminary injunction on December 21, 1962. Defendants appealed to the Court of Appeals and presented new documents; the defendants moved to dismiss the appeal and to remand the suit to the District Court. On March 4, 1963, the Court of Appeals remanded the action to the District Court and upon the remand, the preliminary injunction was dissolved but on July 23, 1963, the Court stayed this portion of its order until the Court of Appeals had determined any appeal. Plaintiff filed an appeal on July 30, 1963. The Court of Appeals filed its opinion on October 23, 1964, affirming denial of a preliminary injunction, and ordered all discovery to be completed within 20 days and that trial be set for as soon as possible thereafter, preferably within 30 days from the date of its order. It is not clear why this appeal took one year and three months, but plaintiff was prosecuting the appeal and certainly could have caused it to be determined much sooner. Defendants have caused much delay in the completion of pretrial discovery. In addition to their failure to answer the set of interrogatories propounded after the October 23, 1964 order of the Court of Appeals, they

caused several delays during the period that the appeal was pending. Judge Palmieri, on July 29, 1964, ordered that certain discovery proceedings be completed by August 6, 1964. He denied a motion made by defendants on August 3, 1964 to extend this time limit. Additional hearings were held on August 24, 1964 and September 2, 1964 in efforts to compel defendants to comply with this order. On September 2, 1964, Judge Palmieri finally entered an endorsement stating that the problems involved in his order had been solved. At the August 24, 1964 hearing, Judge Palmieri made the following statements concerning the defendants:

> "I have attempted to understand the so-called affidavit of compliance of the other side, and, Mr. Bader, I am profoundly shocked by the equivocations, incoherent, lack of frankness and obvious dilatoriness on the part of your client as well as your firm in complying with the order of this Court." p. 4
>
> "Your record of non-compliance, to put it mildly, is shocking." p. 5
>
> "I am not interested in your efforts because your efforts are nothing more than obfuscation, avoidance. That is all your efforts are. You have imposed for two years on your adversary." p. 6

We have had enough delay in these suits. There will be no further discovery by either side other than that ordered herein. Application may be made on or before April 19, 1965 before me to have this consolidated suit set down for trial for a day certain before a Judge to

be designated. If such application is not made prior to this date, an ex parte order is encountered by the Court dismissing all suits. So ordered.

Dated: April 6, 1965

SYLVESTER J. RYAN,
U. S. D. J.

Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER

[SAME TITLE]

Upon the order of Sylvester J. Ryan, Chief Judge of this Court entered April 6, 1965 whcih consolidated these actions, and the affidavit of Henry A. Greenburg, sworn to April 19, 1965, and, it appearing that the defendants in 62 Civil 2816 and the plaintiffs in 63 Civil 2933 and 63 Civil 2267 have failed to comply with the said order, it is

ORDERED, that defendants' answer and counterclaims in 62 Civil 2816 be and the same hereby is stricken and plaintiffs' complaints in 63 Civil 2933 and 63 Civil 2267 be and the same hereby are dismissed, and it is further

Judgment Appealed From

ORDERED, that defendants in 62 Civil 2816 be and they hereby are enjoined from offering for sale, selling delivering or otherwise using any garments bearing the trademark "Slumber-Togs", or any mark confusingly similar thereto, and it is further

ORDERED, that the Clerk of this Court shall enter judgment in favor of the plaintiff in 62 Civil 2816 and in favor of the defendants in 63 Civil 2933 and 63 Civil 2267, to the extent hereinbefore specified.

April 19th, 1965.

SYLVESTER J. RYAN
Chief Judge

Order Filed May 4, 1965

SLUMBERTOGS, INC. v. JIGGS, INC., et al,

JIGGS, INC., et al. v. HERBERT B. LEVENSON et al.

JOSEPH LEVY, et al. v. SLUMBERTOGS; INC., et al.

Endorsement

62 Civ. 2816

63 Civ. 2267

63 Civ. 2933

Defendant in 62 Civil 2816 and plaintiffs in 63 Civil 2933 and 63 Civil 2267 move in these consolidated actions to vacate the judgments entered against them on April 26, 1965.

Movants allege that they did not receive notice of our order dated April 6, 1965. In this order, we gave movants five days in which to answer certain interrogatories served on movants in November, 1964, which they had failed to answer despite two prior orders of this Court. We provided further in our April 6, 1965 order that, if these interrogatories were not answered within this period, an ex parte order, granting judgment to plaintiff in 63 Civil 2816 (defendants in 63 Civil 2933 and 63 Civil 2267), could be submitted. On April 26, 1965, movants had still not answered these interrogatories and we granted judgments.

We have checked the clerk's docket sheets in each of these three actions and, on each sheet car, there is a notation that notice of our April 6, 1965 order was mailed on April 7 to attorneys for movants. In addition, notice of our April 6, 1965 order appeared in the New York Law Journal on April 8, 1965. Our order of April 6, 1965 was

based on three motions, which were returnable before us on March 22, 1965. We heard argument on these motions on this date and reserved decision. Movants were represented by counsel at this hearing. Therefore, movants knew that these motions were sub judice and should have noticed the announcement in the Law Journal on April 8, 1965.

Movants are not entitled to have the judgments against them vacated; this application is denied; so ordered.

Dated: May 3, 1965.

SYLVESTER J. RYAN
U. S. D. J.

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLES]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of I. Walton Bader sworn to January 26, 1965 the undersigned will move this court, before the Part I judge thereof, to be held at the courthouse, Foley Square, New York, New York, Room 128, on February 3, 1965 at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order permitting the defendants in Action No. 1 to move before the Motion Judge sitting in

Endorsement on Notice of Motion to Move for Extension of Time, etc.

Motion Part of this Court, for an order granting consolidation of the above-entitled actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and permitting the undersigned to move before said Motion Judge for an order granting enlargement of the time for the defendants in Action No. 1 to answer certain interrogatories propounded by the plaintiff in Action No. 1 and for such other, further, and different relief as this court may deem just and proper.

Dated: January 26, 1965

Yours, etc.

BADER AND BADER
Attorneys for Defendants in
Action No. 1, Plaintiffs in
Actions No. 2 and No. 3

Endorsement on Notice of Motion to Move for Extension of Time, etc.

The Application "Granted."

So Ordered:

JOHN M. CASHIN
U. S. D. J.

Filed: Feb. 3, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1044

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,

Petitioners,

against

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,

Respondents.

RESPONDENTS' BRIEF

MILTON MOUND,
Attorney for Respondents,
60 East 42nd Street,
New York, N. Y. 10017.

MOUND, BELFER & GREENBURG,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1044

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,

Petitioners,

against

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,

Respondents.

RESPONDENTS' BRIEF

Question Presented

Where District Court entered judgments against petitioners following their repeated willful refusals to obey the Court of Appeals' direction for a prompt trial, and their repeated willful refusals to obey District Court's orders and rules required for the expeditious conduct of litigation, and where the Court of Appeals unanimously affirmed, holding that District Court "acted well within the limits of sound discretion", has there been such a "far departure from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision?

The facts establish the petitioners' repeated and deliberate contempt of the Orders of the Court of Appeals, and

the Orders of six judges, and the rules of the District Court, to the point that Chief Judge Ryan at long last was obliged to enter the order granting judgments against these petitioners, and the Court of Appeals was impelled, not only to find no abuse of discretion, but to add its approval of the manner in which that discretion was exercised, holding:

> "In view of the dilatory and contumacious conduct of plaintiffs and their counsel in virtual defiance of the rules and orders of at least six judges in the district court, the sanction of dismissal was reasonable and correct" (20-21)*

Facts

An Order of the Court of Appeals entered herein on October 23, 1964 directed

> ". . . that the District Court require all depositions and discovery to be completed within 20 days and set the trial for as soon as possible thereafter, preferably within 30 days from the date of this order . . ." (35b)

Petitioners served a Demand for Interrogatories to which respondents promptly served their Answer. Then respondents promptly served on November 27, 1964, their Demand for Interrogatories upon the petitioners. That was the only discovery sought by the respondents from the petitioners in the main action and the final discovery necessary to permit a pre-trial order to be entered and to permit these actions to proceed to trial. Petitioners, contumaciously, refused to answer those interrogatories and refused to deliver signed transcripts of previously completed depositions, despite repeated orders to do so.

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* Page references without any identification letter, refer to petitioners' petition and annexed Appendix filed in this Court; those followed by "a" refer to petitioners' Appendix in the Court of Appeals; and those followed by "b" to respondents' Appendix in the Court of Appeals.

A. The petitioners' contumacious violation of orders of six judges, which supported and required Judge Ryan's order and judgments, from the affirmance of which certiorari is sought.

Judge Ryan was not the first judge, but, as noted by the Court of Appeals, the *sixth judge,* in this case to comment on the petitioners repeated contumacious conduct which the Court could neither control nor curb. That history was placed in the record before Judge Ryan, and we respectfully urge it overwhelmingly supports his decision.

Discovery was used by the respondents to establish the fraud and perjury upon which the petitioners' claims were based. Inevitably the petitioners tenaciously refused to produce before trial the fictitious "facts" and "documents" which they falsely alleged existed.

On August 24, 1964 Judge Palmieri noted on a prior motion respondents made for judgment because of the petitioners contumacious concealment of alleged facts (5b, 13b to 15b):

> "I am convinced from their conduct in this case that they will not do anything to cooperate with you because *they have in their hands the proof which you need* to sustain your case. They *will not give it to you unless they are forced.* The only way to behave with people like that is to just systematically lay the groundwork for a contempt order. They need the persuasion of the clank of a jail door that closes in on them. . . .
> "My own suggestion, in view of the shameful way in which they have imposed upon you here and the way they have acted about this purported compliance and the shameless manner in which they attempt to come before me and claim they have complied with this, leads me to believe that you will need more persuasion than you will have from just an order of this

Court. *They tread the orders of this Court underfoot.* . . .

"I think they are *courting a dismissal.* A dismissal of a suit short of trial is looked upon with disfavor by the Court of Appeals, especially in the Court of Appeals for the Second Circuit.

"This man is going to scream that he didn't have his day in court and that he could have produced this, that and the other thing. . . .

"Mr. Greenburg: . . . This is procedural anarchy.

"The Court: That is what it amounts to. . . .

"I will hold in reserve your motion to dismiss. I allowed you, in the order I signed, to make a motion for a dismissal in the event they did not comply.

"In my opinion, they did not comply. They are attempting in the most transparently insincere and shameful fashion to *frustrate the orders of this Court.* I am convinced of that on the basis of the record of this motion and on the basis of the whole background of the case.

"But, I suggest to you that there is no point in my giving you a remedy that you can't be absolutely sure of holding on to on appeal."

Judge Palmieri had previously commented about the appellants' conduct:

"I have attempted to understand the so-called affidavit of compliance of the other side, and, Mr. Bader, I am profoundly shocked by the equivocations, incoherent, lack of frankness and *obvious dilatoriness* on the part of your client as well as your firm in complying with the order of this Court.

"I have had to spend many hours going into the background of this case, reading the decisions of other judges, trying to understand your paper. Your record of non-compliance, to put it mildly, is shocking." (7b)

"I am not interested in your efforts because your efforts are nothing more than obfuscation, avoidance. That is all your efforts are." (7b)

"You have imposed for two years on your adversary, and I promise you you are not going to impose on me any longer or on this Court any longer." (8b)

". . . for you to keep saying that you will produce whatever you can and cooperate to the best of your ability is nothing more than a sham, a sham, an outright sham." (9b)

"This affidavit of compliance that was submitted in this case is absolutely shocking." (10b)

Judge Palmieri overruled the petitioners' excuse that they could not produce certain documents because they were in the hands of their lawyer, one of whom was an attorney of record in that Court, and of their insurance brokers. The petitioners' counsel ignoring Judge Palmieri's ruling, wrote to respondents' counsel, refusing to produce those documents, stating:

". . . our clients cannot be ordered to produce documents that they do not have." (22b)

The sworn and diametrically contradictory statements of the petitioner Joseph Levy had been set before Judge Thomas F. Murphy, on an earlier phase of this case concerning which Judge Murphy wrote:

"We get the impression . . . that the defendants through Levy are, to put it mildly, far from candid." (23b)

That decision resulted in a preliminary injunction granted by Judge Murphy, which the petitioners proceeded to ignore. When they were cited to show cause why they should not be adjudged in contempt, petitioner Levine

explained his noncompliance:

> "My attorneys have advised me that the determination of the District Court was without warrant in either law or fact." (70b)

Judge Levitt after hearings on that motion ruled:

> "The controversy centers around the facts that the defendants were dilatory in response to the affirmative requirements of the preliminary injunction. However, in spite of their tactics, but due perhaps to the prodding of the contempt proceeding, defendants have now fully complied with the injunction.
>
> "There is no doubt that the defendants were averse to comply with the injunction . . ." (25b)

Respondents moved before Judge Weinfeld for summary judgment dismissing the anti-trust complaint in one of the consolidated actions. Judge Weinfeld decided that motion prior to the Second Circuit's decision in *Dressler* v. *N. B. Sandpiper*, 331 F. 2d 130 (C. A. 2, 1964), and without benefit of that authority, denied the motion. However, petitioners' anti-trust allegations were so incredible that Judge Weinfeld urged the completion of the pending depositions and held:

> ". . . the motion is denied, but with leave to renew upon completion of the *pending depositions*. If it eventually should develop that the process of this Court has been *abused*, an appropriate remedy appears to be available—Rule 11 of the Federal Rules of Civil Procedure." (73b)**

Subsequently, petitioner Levy, the petitioners' sole witness in support of that anti-trust allegation, repudiated under oath all of the allegations of the subscribed com-

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** Disbarment proceedings.

plaint. He testified that he knew of no price cutting by respondents (31b); there were no instances of disparagement of petitioners' products by respondents (31b-32b); in the garment industry, the large retailers were obtaining special prices from "everybody", presumably including himself, and if price discrimination had occurred it was given only to meet prevailing competitive conditions (32b).

Petitioner Jiggs, Inc. had closed its business in December 1963, and the issue and controversy between the parties had long since become moot and academic (87b). Petitioners Philip and Phyllis Levine left the industry and are in the restaurant business (97b). Neither petitioners Philip Levine, Phyllis Levine, nor any other representative of Jiggs, Inc. appeared at any of the hearings before Judge Ryan, nor filed any affidavit of merits or requested vacatur of the judgments, nor expressed any interest in continuing the actions.

The only apparent explanation for petitioners' persistence, and for the continuance of this proceeding is the surety company bond respondent posted on obtaining the preliminary injunction granted by Judge Murphy, which was later vacated on new papers. No Court has ever suggested that the injunction was improperly granted on the original papers (103b).

The penultimate proceedings before Judge Cashin occurred in the Pre-trial Part after the Court of Appeal's order of October 23, 1964 (35b). Those events necessitated the subsequent order by Chief Judge Ryan appointing a *Rule 2 Judge* (District Court Rule 2) and contributed to the Court's final order dismissing the petitioners' pleadings. Those climactic events were:

1. November 27, 1964, the respondents served a demand for interrogatories upon the petitioners. Instead of answering in the normal 10-day period, they requested and were granted 34 days until December 31 to answer those interrogatories (41b).

2. December 31, 1964, petitioners' counsel requested a stipulation further extending petitioners' time to answer those interrogatories until February 15, 1965 (55b). Respondents' counsel refused the request (41b).

3. January 25, 1965, Judge Cashin granted a third extension to petitioners to answer the interrogatories to February 18, 1965 (58b, 92b-93b).

4. February 18, 1965, petitioners' counsel, instead of complying with the order of Judge Cashin, on this date wrote to respondents' counsel that

> ". . . it is quite true that I have the information sufficient to answer the interrogatories . . ." (61b)

Nevertheless, petitioners refused to deliver the interrogatories as ordered by the Court.

5. February 23, 1965, petitioners requested and obtained from Judge Cashin a fourth extension until March 9 to answer the interrogatories (93b).

6. March 9, 1965, petitioners again ignored the orders of the court and respondents moved to strike the petitioners' pleadings, and made an application to Chief Judge Ryan for the appointment of a case Judge under District Court General Rule 2 (1b, 37b).

B. The petitioners' contumacious conduct before Judge Ryan, which finally resulted in the judgments, from the affirmance of which certiorari is sought.

7. March 22, 1965, on the return of the above motions, Judge Ryan told Mr. Maximilian Bader, petitioners' counsel, that he would grant a fifth extension of an additional 10 days in which to answer the interrogatories and that there would be no further delay beyond that date (91b).

8. April 7, 1965, the order of Judge Ryan endorsed on the back of the motion papers, confirmed what the Judge had told Mr. Bader on March 22, but in effect granted a sixth extension of an additional 10 days from April 7. The order directed that:

> ". . . defendants are given an additional 10 days from the date hereof in which to answer. We will not, however, accept any delay beyond this period." (5a)

Thereafter, in regular course, the Clerk of the District Court mailed three postcards to petitioners' attorneys advising of the entry of the order (75b, 76b, 78b, 80b). The supervisor of the Clerk's Docket Section verified that she personally handled the mailing of the notices (75b). The customary notice also was published in the New York Law Journal advising of the entry of the order (82b).

9. April 19, 1965. The petitioners now having ignored Judge Ryan's final oral order of March 22 and his final written order of April 7, respondents' counsel submitted an affidavit and proposed order to Judge Ryan, which was duly entered and docketed (66b, 67b).

10. April 26, 1965. Petitioners' counsel, still without submitting the interrogatories or attempting in any way to comply with any of the orders of the Court, obtained an order to show cause from Judge Ryan returnable before him, to vacate his order and the judgments entered on it.

11. April 30, 1965. A hearing was held by Judge Ryan on that order to show cause (89b-104b). The petitioners *still* did not comply with any of the prior orders of the court. Concerning such persistent contempt, the record, at 92b-94b, shows:

> "The Court: Have you prepared the answers to the interrogatories?
>
> Mr. Bader: Yes, your Honor, I have prepared them.

I want to discuss the matter with Mr. Levy and Mr. Levine, and I represent to your Honor that I can—

The Court: Have you put them in final form as yet?

Mr. Bader: I have put them in draft form. I could have them in final form by 4 p.m. today, your Honor.

The Court: You were ordered to answer these interrogatories by Judge Cashin, weren't you, as late as February 18, 1965?

Mr. Bader: By stipulation, your Honor. That was not by means of order.

We had had a number of—

The Court: Was the stipulation approved by Judge Cashin?

Mr. Bader: Yes, your Honor.

The Court: So that it became an order of the court entered on consent.

Mr. Bader: Yes, your Honor.

The Court: So that when I stated that you were ordered by Judge Cashin to answer these interrogatories on February 18, 1965, I stated a fact, didn't I?

Mr. Bader: You did, your Honor.

The Court: Now, then following that, was this matter again on before Judge Cashin on February 23, 1965?

Mr. Bader: Yes, your Honor.

• • •

The Court: On that date did Judge Cashin give you a further extension to answer these interrogatories to March 9th?

Mr. Bader: Yes, your Honor.

The Court: And did you answer them on March 9th?

Mr. Bader: We could not answer them.

The Court: Did you answer them?

Mr. Bader: No, your Honor, we did not.

The Court: Did you then apply to, or did Judge Cashin give you, a third extension of time to March 23, 1965 to answer these interrogatories?

Mr. Bader: Yes, your Honor.

The Court: Did you answer them?

Mr. Bader: No, your Honor, we could not, we were in no position to.

The Court: And you have not to this date?

Mr. Bader: We have prepared—

The Court: Wait a minute, please.

You have not answered them to this date, have you?

Mr. Bader: No.

The Court: Now, do I direct in my endorsement dated April 6 that these interrogatories be answered within five days?

Mr. Bader: Yes, your Honor, you so directed.

The Court: That was the fourth extension of time that you had been granted?

Mr. Bader: Yes, your Honor.

The Court: By Judge Cashin and by an additional extension of time by me?

Mr. Bader: Yes, your Honor."

Judge Palmieri had accurately analyzed the appellants' contemptuous attitude, and predicted and warned them of the inevitable consequences:

> "They tread the orders of this court under foot . . ." (13b)
>
> "I think they are courting a dismissal . . ." (14b)
>
> "This man is going to scream that he didn't have his day in court and that he could have produced this, that and the other thing." (14b)

Most respectfully we submit, on this record Judge Ryan exercised sound judicial discretion in granting the order and judgments petitioners now complain of, the Court of Appeals was correct in not intefering with Judge Ryan's discretion and in expressly approving his action, and there is no call for this Court's exercise of supervisory powers through Certiorari.

Corrections of Petitioners' Statement of "Facts Involved"

1. At page 2 of the petition, petitioners erroneously assert a valid and prior interest in the trademark "Slumba-togs". In fact:

a) Respondent Slumbertogs, Inc., since 1944 has been owner of the trademark "Slumbertogs" registered on the principal and supplemental registers in the United States Patent Office. Its sales are well in excess of a million dollars a year, and many hundreds of thousands of its "Slumbertogs" trademark labels have been attached to each garment it has sold in the women's and children's sleepwear industry during the past 20 years. (22b)

b) Petitioner Jiggs was organized in April, 1962. It adopted the confusingly similar trademark "Slumba-Togs" which it used on a line of women's and children's sleepwear in direct competition with plaintiff. (22b)

c) Petitioners assert that after this litigation was started they belatedly acquired title to their trademark from a corporation controlled by petitioner Levy which previously had used "Slumba-togs" But their alleged assignor corporation was insolvent and its trademark was the property of its creditors and could not be assigned by the corporation and also, the alleged trademark assignment was admittedly without consideration and unaccompanied by "good-will" any going business, or assets, and was therefore void as a "naked assignment" under State and Federal law. (26b) *Uncas Mfg. Co.* v. *Clark & Coombs Co.*, 200 F. Supp. 831 (1962); *Browning King Co. of N. Y.* v. *Browning King Co.*, 176 F. 2d 105, at 107; *Golenpaul* v. *Rossett*, 174 Misc. 114, at 118; *Avon Shoe Co.* v. *David Crystal, Inc.*, 171 F. Supp. 293, affd. 279

F. 2d 607; *Falk* v. *American West Indies Trading Co.*, 180 N. Y. 445.

2. At pages 2 and 3 petitioners assert that respondents refused to pay a bill of costs. In fact, petitioners did not enter an order fixing the amount of costs payable. Petitioners' counsel, in his letter of February 18, 1965, stated:

> "You will note that I have not yet entered the order with reference to the trial date and for payment of costs by your client since I did not feel that I should do so until I should have answered your interrogatories." (61b-62b)

Respondents themselves subsequently ascertained the amount of costs, and petitioners received full credit upon the respondent's Bill of Costs following the dismissal.

3. At page 4, petitioners argue erroneously that their response to the interrogatories was somehow related to the motion for consolidation. This contention is patently contrived. In his affidavit sworn to February 8, 1965 in support of his motion for consolidation, petitioners' counsel conceded the contrary by stating, regarding the discovery, that:

> "Pretrial proceedings in these actions have been combined, depositions have been taken in all three actions simultaneously."

POINT I

Answering petitioners' Point I, there was no violation of the Fifth Amendment because petitioners had no legal trademark property to be deprived of, and the proceedings below were conducted with an excess of zeal for due process of law.

As shown above, petitioners were junior users by many years of a trademark confusingly similar to the respondents' mark. Even after improvising a fictitious "chain of

title" to an alleged prior user, their title failed because their "assignments" were void. Thus, they had no legally recognized trademark property to be deprived of (22b, 26b).

Secondly, their alleged anti-trust causes of action were repudiated under oath by their sole witness, and can hardly be described as a lost "property" right (31b-32b).

Finally, the dismissals followed a series of proceedings in which the processes of the law and rules were scrupulously observed by at least six District Court Judges, three Court of Appeals Judges, and all save the petitioners, as recounted by Judge Ryan at pages 9-11, *supra*.

The Federal Judiciary has long recognized that the striking of pleadings in cases of wanton abuse of procedure is appropriate and necessary to protect the dignity and function of the Court, as well as to protect the rights of litigants. Rule 37, Rules of Civil Procedure; *Hammond Packing Company* v. *State of Arkansas,* 212 U. S. 322, 295 S. Ct. 370, at 380; *Von Der Heydt* v. *Kennedy,* 299 F. 2d 459 (C.A.D.C., 1962), cert. den. 370 U. S. 916; *Bourgeois* v. *El Paso Natural Gas Co.,* 20 F.R.D. 358 (D.C.N.Y., 1957); *V. O. Machinoimport* v. *Clark Equipment Co.,* 12 F.R.D. 191 (D.C.N.Y., 1951); *Mooney* v. *Central Motor Lines,* 222 F. 2d 569 (C. A. 6); and *First Iowa Hydro Electric Coop.* v. *Iowa Illinois Gas & Electric Co.,* 245 F. 2d 613 (C. A. 8).

The constitutional validity of dismissal for refusal to make discovery was established by this Court in *Hammond Packing Company* v. *State of Arkansas,* 212 U. S. 322, 295 S. Ct. 370, at page 380:

> "And, beyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations

prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed . . .

As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referrable to the undoubted right of the law making authority to create a presumption in respect to the want of a foundation of an asserted defense against a defendant who suppresses, or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation."

In *T.W.A.* v. *Hughes,* the Court struck defendant's answers and counterclaims, and granted judgment to T.W.A., because of Howard Hughes' refusal to submit to pre-trial examination. 332 F. 2d 602 (1964), cert. dismissed 380 U. S. 248, 85 S. Ct. 934 (1965). Judge Lumbard's opinion at page 614 is particularly applicable at bar:

"The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See *Nasser* v. *Isthmian Lines,* 2d Cir., 1964, 331 F. 2d 124; *Link* v. *Wabash Railroad Co.,* 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); *Gill* v. *Stolow,* 240 F. 2d 669 (2 Cir. 1957)."

In *Nasser* v. *Isthmian Lines,* cited above in the *T.W.A.* v. *Hughes* decision, Judge Kaufman writing an affirmance of a dismissal under circumstances similar to those at bar, stated at p. 129:

> "In a complex and litigious society, procedural anarchy cannot be condoned".

It is noteworthy that Judge Palmieri considered these petitioners' actions to be "procedural anarchy" [please see p. 4 above] and it is fully consistent with sound judicial practice that neither Judge Ryan nor the Court of Appeals would condone it.

POINT II

Answering petitioners' Point II and Point IV, there is no conflict between the circuits, because at bar, petitioners *did* receive notice repeatedly that default judgment would be entered against them.

Petitioners attempt to argue that the Court of Appeals' decision constituted an approval of entry of judgment without notice, and therefore conflicts with FRCP 55(b)(2) and other Circuits. However, the Court of Appeals' decision has no such meaning and there is no conflict; the affirmance herein is based on the fact that petitioners received full and timely notice:

1 March 22, 1965—Oral notice from Judge Ryan to petitioners' counsel (91b).

2 April 7, 1965—Notice by docketing of Judge Ryan's confirmatory written order in the Clerk's Office. *Nicholas-Morris Corporation* v. *Morris,* 24 F.R.D. 478, aff'd. 279 F. 2d 81 (C. A. 2, 1960).

3 April 7, 1965—Notice, in the form of three postal cards, mailed by the Clerk of the Court to petitioners' counsel (75b, 76b, 78b, 80b).

4 Notice by the publication of the entry of the order in The New York Law Journal (82b).

5 Notice and warnings from five District Court Judges prior to Judge Ryan.

POINT III

Answering petitioners' Point III, the Court did not fail to follow its own prior "determination", because the first panel decided only the contents of the Appendix, and did not have before it and did not determine the merits of the appeal from Judge Ryan's order.

On pp. 4-5, and again in Point II (pp. 12-13), petitioners assert in error that a Court of Appeals panel made a "determination" that a trial should be held, and that the subsequent panel that affirmed Judge Ryan failed to "follow" the first panel. In fact, the only issue presented to, and the only "determination" made by the first panel, related to the contents of the Appendix on appeal. That first panel was not presented with the facts and merits of the subsequent appeal.

POINT IV

Answering petitioners' Points V, VI and VII, petitioners failed to show mistake, inadvertence, surprise, or excusable neglect, and the Court of Appeals properly refused to interfere with the "reasonable and correct" exercise of District Court's discretion.

The application to vacate was decided under the standards established in F.R.C.P. 60(b) which provides in applicable part:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER.—

"(b) MISTAKES—INADVERTENCE—EXCUSABLE NEGLECT—NEWLEY DISCOVERED EVIDENCE—FRAUD. On motion and

upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise or excusable neglect . . ."

The excuse tendered by Mr. Bader that he, as petitioners' attorney of record in one of the consolidated actions did not receive one of three post cards mailed by the Clerk notifying him and his associate attorneys of the entry of the April 6th order, is irrelevant as a matter of statute. The *fact of mailing* of notice, and not proof of receipt, is sufficient notice for all purposes. Even if the Clerk had not sent the notice, it would not affect the running of time in which to take an appeal.

"Rule 77. District Courts and Clerks.—

"(d) Notice Of Orders Or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. *Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules. Lack of notice* of the entry by the clerk *does not affect the time to appeal* or relieve or *authorize the court to relieve a party for failure to appeal* within the time allowed." (emphasis added)

And, even if the Clerk of the Court had not sent notice to the petitioners, it is well established that the dismissal would not be unconstitutional. This Court held in *Link* v. *Wabash Railroad Company,* 370 U. S. 626, at pages 632 to 634:

"Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. . . . The adequacy of notice and hearing respecting proceedings

> that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.
>
> • • •
>
> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayer, 101 U. S. 320, 326, 25 L. Ed. 955."

At bar, however, there is uncontroverted proof that three, not one, post cards were mailed to the various attorneys for the petitioners. Furthermore, appellants *were told by Judge Ryan* what the order would contain (91b), the notice of entry was printed in the Law Journal (82b), and they persisted in their refusal to comply with the Order even when they moved to set aside the judgments.

In *Nichols-Morris Corporation* v. *Morris,* 24 F.D.R. 478, affd. 279 F. 2d 81 (C. A. 2, 1960), plaintiff applied for an extension of its time to appeal from a judgment. The motion was decided under F.R.C.P. 73(a) which requires the same showing of "excusable neglect" required in F.R.C.P. 60(b)(1). Plaintiff tendered the same argument, as at bar, that the Clerk had failed to send them notice. Judge Kaufman, in denying the motion, held:

> "Counsel also urged that the neglect was excusable because the clerk of the court had failed to send a

notice of entry to him as provided for in Rule 77(d) of the Federal Rules of Civil Procedure. Rule 77(d) states in part: 'Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).' . . . The Committee's Notes go on to state: '*It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk * * * or to rely on the adverse party's failure to serve notice of the entry of a judgment.*' 28 U.S.C.A. at page 474." (emphasis added)

Judge Hand's affirmance in the Court of Appeals left no doubt that in Federal practice, the burden is on the attorney to follow the course of his action, and not to rely upon the Court or his adversary:

"The change in Rule 77(a) plainly charges the putative appellant with a duty to follow the progress of the action and advise himself when the court makes the order against which he wishes to protest. We cannot avoid the conclusion that the failure to act was the result either of a failure to understand the law, or of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." (at p. 83)

In *Ohliger* v. *United States*, 308 F. 2d 667 (C. A. 2, 1962), plaintiff refused to answer interrogatories for two years, whereupon an order was entered dismissing the complaint. Appellant moved pursuant to Rule 60(b) to set the dismissal aside, which motion was denied by Chief Judge Ryan. In affirming *per curiam*, the Court of Appeals for the Second Circuit stated at pages 667-8, that:

"Since the date his complaint was filed, the appellant has consistently failed to prosecute his claim and to

respond to the interrogatories submitted by the defendant. Counsel justifies his conduct by pleading ignorance of the Court's rules of procedure. Surely this is not the sort of 'excusable neglect' contemplated by Federal Civil Rule 60(b), 28 U.S.C.A. as ground for vacating an adverse judgment. *Counsel's carelessness cannot be excused by this Court if it is to perform its obligation to other litigants whose cases are necessarily delayed by such conduct.* Judge Ryan's order under Rule 60(b) should be overturned only if there is a clear abuse of discretion, and none has been shown. We agree with the court below that '*efficient judicial administration dictates that the relief sought must be denied.*' " (emphasis added)

The facts at bar are similar to *Parker* v. *Broadcasting Music Inc.*, 289 F. 2d 313 (C. A. 2, 1961). Plaintiff there refused to answer questions and produce documents despite repeated orders to do so. Finally the case came before Chief Judge Ryan on the Review Calendar. Judge Ryan directed that the action would be dismissed without notice unless plaintiff filed a note of issue (implying completion of discovery) within six months. On the day the six-month period expired, plaintiff's attorney announced that he withdrew from the case. Thereupon, plaintiff was given another 30 days. At the end of this 30 days a dismissal order was entered. Subsequently, plaintiff with new attorneys moved under F.R.C.P. 60(b) before Judge Ryan to vacate the dismissal. Judge Ryan denied the application. Judge Waterman, writing for the Second Circuit, ruled that notwithstanding claims of conflict between plaintiff and her former counsel, Judge Ryan acted properly

". . . when he decided that plaintiff failed to sustain the burden required under Rule 60(b)(1) to show that she should be relieved from the dismissal order because of 'mistake, inadvertence, surprise, or excusable neglect.' "

CONCLUSION

a. Judge Ryan's exercise of his discretion was reasonable, justified, and conducted with full notice and scrupulous regard for law and procedure.

b. The Court of Appeals was correct in holding that Judge Ryan's order was no departure from the accepted and usual course of judicial proceedings, and in fact was "well within the limits of sound discretion".

c. The proceeding and result below, it is respectfully contended, do not call for an exercise of this Court's power of supervision.

Respectfully submitted,

MILTON MOUND.

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